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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 14, 2016

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOLEEN OLSON,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:15-CV-03152-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 12, 16. Attorney D. James Tree represents Joleen Olson (Plaintiff); Special Assistant United States Attorney Jennifer A. Kenney represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on April 19, 2012, alleging disability since September 7, 2010, due to bipolar disorder, posttraumatic stress disorder, and asthma. Tr. 199-206, 221, 225. The applications were denied initially and upon reconsideration. Tr. 120-123, 128-139. Administrative Law Judge (ALJ) Gordon

1 W. Griggs held a hearing on January 27, 2014, and heard testimony from Plaintiff
2 and vocational expert Kimberly S. Mullinax. Tr. 40-69. The ALJ issued an
3 unfavorable decision on February 13, 2014. Tr. 21-34. The Appeals Council
4 denied review on June 29, 2015. Tr. 1-6. The ALJ's February 13, 2014, decision
5 became the final decision of the Commissioner, which is appealable to the district
6 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review
7 on August 28, 2015. ECF No. 1.

8 **STATEMENT OF FACTS**

9 The facts of the case are set forth in the administrative hearing transcript, the
10 ALJ's decision, and the briefs of the parties. They are only briefly summarized
11 here.

12 Plaintiff was 39 years old at the alleged date of onset. Tr. 199. Plaintiff
13 completed her GED in 2004. Tr. 226. She has worked as a bookkeeper, an
14 insurance claims representative, a customer service representative, an office
15 administrator, and the owner of a cleaning business. *Id.* Plaintiff reported she
16 stopped working in September of 2010 because of her condition. Tr. 225.

17 **STANDARD OF REVIEW**

18 The ALJ is responsible for determining credibility, resolving conflicts in
19 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
20 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
21 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
22 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
23 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
24 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
25 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
26 another way, substantial evidence is such relevant evidence as a reasonable mind
27 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
28 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational

1 interpretation, the court may not substitute its judgment for that of the ALJ.
 2 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
 3 evidence will be set aside if the proper legal standards were not applied in
 4 weighing the evidence and making the decision. *Brawner v. Secretary of Health*
 5 and *Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
 6 supports the administrative findings, or if conflicting evidence supports a finding
 7 of either disability or non-disability, the ALJ's determination is conclusive.
 8 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

9 **SEQUENTIAL EVALUATION PROCESS**

10 The Commissioner has established a five-step sequential evaluation process
 11 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 12 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 13 through four, the burden of proof rests upon the claimant to establish a *prima facie*
 14 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
 15 burden is met once the claimant establishes that physical or mental impairments
 16 prevent her from engaging in her previous occupations. 20 C.F.R. §§
 17 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do her past relevant work,
 18 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
 19 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
 20 exist in the national economy which the claimant can perform. *Batson v. Comm'r*
 21 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If the claimant cannot
 22 make an adjustment to other work in the national economy, a finding of "disabled"
 23 is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

24 **ADMINISTRATIVE DECISION**

25 On February 13, 2014, the ALJ issued a decision finding Plaintiff was not
 26 disabled as defined in the Social Security Act.

27 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 28 activity since September 7, 2010, the alleged date of onset. Tr. 23.

1 At step two, the ALJ determined Plaintiff had the following severe
2 impairments: bipolar I disorder, asthma, and migraine headaches. Tr. 23.

3 At step three, the ALJ found Plaintiff did not have an impairment or
4 combination of impairments that met or medically equaled the severity of one of
5 the listed impairments. Tr. 24.

6 At step four, the ALJ assessed Plaintiff's residual functional capacity and
7 determined she could perform a full range of work at all exertional levels with the
8 following nonexertional limitations:

9 [S]he is limited to occasional exposure to pulmonary irritants such as
10 dust, fumes, odors, gases, pollens, airborne pollutants, and poor
11 ventilation; she is limited to occasional exposure to extremely bright
12 light and to very loud noise; she is limited to occasional exposure to
13 temperature extremes; she is limited to occasional and superficial
14 interaction with the public and with co-workers; she would not perform
well as a member of a highly interactive or interdependent work group.

15 Tr. 25-26. The ALJ identified Plaintiff's past relevant work as bookkeeper and
16 houseworker – general. Tr. 32. He found that Plaintiff was able to perform this
17 past relevant work. *Id.*

18 In the alternative to denying the claim at step four, the ALJ proceeded to
19 step five and determined that, considering Plaintiff's age, education, work
20 experience and residual functional capacity, and based on the testimony of the
21 vocational expert, there were other jobs that exist in significant numbers in the
22 national economy Plaintiff could perform, including the jobs of mail clerk,
23 document preparer, and assembler. Tr. 33. The ALJ concluded Plaintiff was not
24 under a disability within the meaning of the Social Security Act at any time from
25 the alleged date of onset, September 7, 2010, through the date of the ALJ's
26 decision, February 13, 2014. Tr. 34.

27 ISSUES

28 The question presented is whether substantial evidence supports the ALJ's

1 decision denying benefits and, if so, whether that decision is based on proper legal
2 standards. Plaintiff contends the ALJ erred by (1) failing to properly credit
3 Plaintiff's symptoms complaints; (2) failing to properly weigh the opinion of
4 Richard Vaughan, M.D.; (3) failing to properly weigh the opinion of Sue Gunn,
5 M.S.; and (4) failing to include all the limitations opined by the state agency non-
6 examining medical advisors in the residual functional capacity determination.

7 **DISCUSSION**

8 **A. Credibility**

9 Plaintiff contests the ALJ's adverse credibility determination in this case on
10 three fronts: (1) that the ALJ failed to understand the episodic nature of bipolar
11 disorder; (2) that any credibility determination is erroneous under S.S.R. 16-3p;
12 and (3) that the ALJ failed to provide legally sufficient reason for rejecting
13 Plaintiff's testimony. ECF No. 12 at 3-13.

14 **1. Episodic nature of bipolar disorder**

15 Plaintiff asserts that the ALJ discredited Plaintiff's symptom testimony by
16 misunderstanding or failing to consider the inherently episodic nature of bipolar
17 disorder and relying on a few periods of time when Plaintiff's symptoms improved
18 to conclude that her symptoms were not as limiting as alleged. ECF No. 12 at 3-8.

19 The Ninth Circuit has held that in mental health cases, "it is error to reject a
20 claimant's testimony merely because symptoms wax and wane in the course of
21 treatment," and it is error to rely on "a few isolated instances of improvement over
22 a period of months or years and to treat them as a basis for concluding that a
23 claimant is capable of working." *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir.
24 2014). In an unpublished decision, the Ninth Circuit specifically addressed bipolar
25 disorder, stating that "[g]iven the episodic nature of bipolar disorder, short-lived
26 improvements in functioning are consistent with the diagnosis and cannot, by
27 themselves, constitute substantial evidence to override treating source opinions that
28 Buck was significantly impaired." *Buck v. Colvin*, No. 12-35032, 540 Fed. Appx.

1 772, 773 (9th Cir. October 2, 2013).

2 The above Ninth Circuit holdings must be reconciled with the circuit's
3 deference to the ALJ's interpretation of the evidence: if the evidence is susceptible
4 to more than one rational interpretation, the court may not substitute its judgment
5 for that of the ALJ. *Tackett*, 180 F.3d at 1097.

6 Here, the ALJ specifically points to Dr. Vaughn's reports from August 2010,
7 October 2010, January 2011, February 2011, October 2011, June 2012, and July
8 2012, and counseling records from June 2012, July 2012, March 2013, and May
9 2013 to show improvement with treatment and medications and that when
10 symptoms were increased, the increase was associated with increased stress in
11 Plaintiff's life. Tr. 27-28. Plaintiff argues that these are cherry picked records and
12 reading the records between these dates shows the cyclical nature of Plaintiff's
13 symptoms. ECF No. 12 at 4-5.

14 A review of the record as a whole supports the ALJ's determination.
15 Plaintiff specifically argues that the records surrounding August 23, 2010, a
16 treatment date the ALJ cited to support his conclusion that Plaintiff's impairments
17 improved with treatment and medications, show the cyclical nature of Plaintiff's
18 impairment. ECF No. 12 at 4-5. The August 16, 2010, appointment was
19 Plaintiff's first appointment with Dr. Vaughan and she reported being suicidal. Tr.
20 323-324. Dr. Vaughan prescribed Zoloft. Tr. 323. By August 23, 2010, Dr.
21 Vaughan found Plaintiff to be smiling and more engaging and only noted a flat
22 affect. Tr. 321. On October 20, 2011, Plaintiff reported taking her medications,
23 but was experiencing increased stress living with her mother. Tr. 319. Dr.
24 Vaughan found that Plaintiff was not anxious, did not have flight of ideas, was not
25 suicidal, and had a flat affect. *Id.* Despite Plaintiff's assertions, this supports the
26 ALJ's conclusions that Plaintiff's mental health impairments improved with
27 medication and occasional exacerbations were due to situational stressors and that
28 despite Plaintiff's reports of exacerbated symptoms the objective evidence

1 remained the same after Plaintiff was started on medication.

2 Next, Plaintiff argues that the ALJ did not accurately reflect the records
 3 discussed in his determination. ECF No. 12 at 5-8. However, reviewing the
 4 records shows that when Plaintiff took her medication as prescribed, while her
 5 reports to Dr. Vaughan varied, the objective evidence relatively remains the same.
 6 *See* Tr. 317-318 (September 8, 2010 – normal affect, negative for anhedonia, and
 7 not anxious); Tr. 315 (January 13, 2011 – normal affect, negative for anhedonia,
 8 not anxious, not euphoric, no flight of ideas, pressured speech, and no suicidal
 9 ideation); Tr. 313-314 (February 17, 2011 – normal affect, negative for anhedonia,
 10 not anxious, not euphoric, no flight of ideas, no pressured speech); Tr. 303-304
 11 (September 30, 2011 – off medications due to a failure to attend appointments.
 12 She was agitated, anxious, irritable, and had pressured speech); Tr. 305-306
 13 (October 20, 2011 – off medications due to suicidal thoughts. She had flight of
 14 ideas, poor insight, and poor judgement); Tr. 298-299 (November 2, 2011 –
 15 restarted medications and had flat affect, not agitated, not anxious, not euphoric, no
 16 flight of ideas, and no pressured speech); Tr. 295-296 (March 1, 2012 – only taking
 17 half the prescribed does of Risperdal and had depressed affect and positive for
 18 anhedonia); Tr. 292-293 (June 8, 2012 – negative for anhedonia, not agitated, not
 19 anxious, not euphoric, no flight of ideas, no pressured speech, demonstrated
 20 appropriate mood and affect, and good eye contact and psychomotor).

21 The Court acknowledges that the impairment of bipolar disorder is episodic
 22 in nature, however, substantial evidence supports the ALJ's conclusion that when
 23 Plaintiff was medicated these episodes did not occur at the severity alleged by
 24 Plaintiff. Therefore, the ALJ did not error.

25 **2. S.S.R. 16-3p**

26 Plaintiff argues that any rejection of her symptoms based on "credibility" is
 27 erroneous under S.S.R. 16-3p. ECF No. 12 at 8-9.

28 On March 16, 2016, S.S.R.16-3p "Evaluation of Symptoms in Disability

1 Claims" became effective, eliminating the term "credibility" from the Social
2 Security Administration's policy, and clarifying "adjudicators will not assess an
3 individual's overall character or truthfulness in the manner typically used during an
4 adversarial court litigation." Instead, the "adjudicators will focus on whether the
5 evidence establishes a medically determinable impairment that could reasonably be
6 expected to produce the individual's symptoms and given the adjudicator's
7 evaluation of the individual's symptoms, whether the intensity and persistence of
8 the symptoms limit the individual's ability to perform work-related activities." *Id.*
9 In doing so, the Commissioner noted that ALJs had been following previous sub-
10 regulatory policy that had contained the term "credibility":

11 We are rescinding SSR 96-7p: Policy Interpretation Ruling Titles II and
12 XVI Evaluation of Symptoms in Disability Claims: Assessing the
13 Credibility of an Individual's Statements and replacing it with this
14 Ruling. We solicited a study and recommendations from the
15 Administrative Conference of the United States (ACUS) on the topic of
16 symptom evaluation. Based on ACUS's recommendations and our
17 adjudicative experience, we are eliminating the use of the term
18 "credibility" from our sub-regulatory policy, as our regulations do not
19 use this term. In doing so, we clarify that subjective symptom
evaluation is not an examination of an individual's character. Instead,
we will more closely follow our regulatory language regarding
symptom evaluation.

20 S.S.R. 16-3p.

21 First, Social Security Rulings issued by the Commissioner do not have the
22 force of law, however reviewing courts will give them some deference because
23 they represent the Commissioner's interpretation of agency regulations. *See* 20
24 C.F.R. § 402.35(b)(1); *Holohan v. Massanari*, 246 F.3d 1195, 1202 n.1 (9th Cir.
25 2001). Therefore, Plaintiff's argument that the ALJ's reasons for rejecting her
26 testimony violates S.S.R. 16-3p and, therefore, violates regulatory authority is an
27 incomplete argument. Plaintiff fails to point to a single regulation that the ALJ
28 violated.

1 Second, S.S.R. 16-3p does not state that S.S.R. 96-7p and the use of the term
 2 “credibility” per se violated regulatory authority. Instead, the purpose of the ruling
 3 was to “clarify that subjective symptom evaluation [was] not an examination of an
 4 individual’s character,” and instead is an evaluation of the intensity and persistence
 5 of reported symptoms to determine how those symptoms limit a claimant’s ability
 6 to perform work-related activities. S.S.R. 16-3p.

7 Here, the ALJ did not assess Plaintiff’s overall character or truthfulness in
 8 the manner typically used during an adversarial court litigation. Instead, he
 9 applied the test originally set out in *Cotton v. Bowen*, 799 F.2d 1403 (9th Cir.
 10 1986), and then he evaluated the intensity, persistence, and limiting effects of
 11 Plaintiff’s symptoms to determine the extent to which they limit Plaintiff’s
 12 functioning and he found that Plaintiff’s statements regarding intensity,
 13 persistence, and limiting effects of her symptoms to be unreliable. Tr. 26.

14 “The *Cotton* test imposes only two requirements on the claimant: (1) she
 15 must produce objective medical evidence of an impairment or impairments; and (2)
 16 she must show that the impairment or combination of impairments *could*
 17 *reasonably be expected to* (not that it did in fact) produce some degree of
 18 symptom.” *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996). Once a
 19 claimant meets the *Cotton* test and there is no affirmative evidence suggesting the
 20 claimant is malingering, the ALJ may reject the claimant’s testimony regarding the
 21 severity of her symptoms for specific, clear and convincing reasons. *Id.* at 1284.
 22 The *Cotton* test and the ALJ’s ability to reject a claimant’s testimony regarding the
 23 severity of her symptoms is represented in S.S.R. 16-3p: “adjudicators will focus
 24 on whether the evidence establishes a medically determinable impairment that
 25 could reasonably be expected to produce the individual’s symptoms and *given the*
 26 *adjudicator’s evaluation of the individual’s symptoms*, whether the intensity and
 27 persistence of the symptoms limit the individual’s ability to perform work-related
 28 activities.” (Emphasis added.)

1 Unlike S.S.R. 16-3p, and S.S.R. 96-7p prior to March 16, 2016, the *Cotton*
 2 test and the ALJ's ability to reject Plaintiff's testimony regarding her symptoms
 3 under the aforementioned cases has the force of law in this circuit and must be
 4 followed by this Court. Therefore, Plaintiff's argument that any rejection of her
 5 testimony based on credibility is *per se* error is not accepted.

6 **3. Specific, clear and convincing reasons**

7 Plaintiff asserts that the ALJ's reasons for finding Plaintiff less than fully
 8 credible regarding the persistence, severity, and limiting effects of her symptoms
 9 are not supported by the evidence of record. ECF No. 12 at 8-13.

10 As discussed above, absent affirmative evidence of malingering, the ALJ's
 11 reasons for rejecting the claimant's testimony must be "specific, clear and
 12 convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
 13 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:
 14 rather the ALJ must identify what testimony is not credible and what evidence
 15 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

16 The ALJ found Plaintiff was less than fully credible concerning the
 17 intensity, persistence, and limiting effects of her symptoms. Tr. 26. The ALJ
 18 reasoned that Plaintiff was less than fully credible because (1) medical records
 19 show her asthma symptoms are well controlled with medication, (2) she failed to
 20 quit smoking even with asthma, (3) she told a provider she was able to function
 21 and ignore her reported severe headaches, (4) her reported symptoms were
 22 inconsistent with her reported activities of caring for family members, dating, and
 23 attending group therapy, and (5) her testimony at the hearing was inconsistent with
 24 what she told providers at appointments. Tr. 26-27, 29-30.

25 Plaintiff only challenges the ALJ's determinations regarding her dating, her
 26 attending group therapy, and her testimony at the hearing as reasons for finding
 27 Plaintiff less than fully credible concerning the intensity, persistence, and limiting
 28 effects of her symptoms. ECF No. 12 at 9-13. Therefore, the Court need not

1 address the remaining unchallenged reasons provided by the ALJ. *See Carmickle*
 2 *v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (the court
 3 ordinarily will not consider matters on appeal that are not specifically and
 4 distinctly argued in an appellant's opening brief).

5 The ALJ's determination that Plaintiff's robust dating history was
 6 inconsistent with her reported symptoms of social anxiety is a legally sufficient
 7 reason to find Plaintiff less than fully credible regarding her symptom statements.
 8 A claimant's daily activities may support an adverse credibility finding if the
 9 claimant's activities contradict her other testimony. *Orn v. Astrue*, 495 F.3d 625,
 10 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). In
 11 November of 2010, she first reported she was not dating and then reported that she
 12 was actually seeing two individuals. Tr. 346. In April of 2012, Plaintiff reported
 13 beginning to date a man she knew when she was 14. Tr. 374. In October 2012,
 14 Plaintiff reported meeting a new boyfriend and discussed a conflict with him. Tr.
 15 585, 588. In April of 2013, Plaintiff discussed the number of people she had slept
 16 with in a draft of her book. Tr. 663. In May of 2013, Plaintiff reported
 17 reconnecting with an old boyfriend. Tr. 657. The ALJ's determination that
 18 Plaintiff was actively dating multiple individuals throughout the relevant time
 19 period is supported by substantial evidence. His determination that this was
 20 inconsistent with Plaintiff's reported symptoms of social anxiety is a legally
 21 sufficient reason to reject Plaintiff's symptom reports.

22 The ALJ's determination that Plaintiff's ability to attend group therapy and
 23 participate without decompensation was inconsistent with Plaintiff's reported
 24 social anxiety is a legally sufficient reason to reject Plaintiff's symptom
 25 statements. The records show that she was so involved in therapy and willing to
 26 discuss her own issues, that she often had to be reminded to return to the relevance
 27 of the group and instructed to reduce her social interaction with group members.
 28 Tr. 359, 487, 491, 517. There is no evidence that Plaintiff's social anxiety

1 interfered with her ability to cooperate with group therapy. Therefore, the ALJ's
2 determination is supported by substantial evidence and is a legally sufficient reason
3 for rejecting Plaintiff's symptom reports.

4 The ALJ's fifth reason for rejecting Plaintiff's symptom reports, that her
5 testimony at the hearing was inconsistent with what she told providers at
6 appointments, is a legally sufficient reason. The ALJ may consider "ordinary
7 techniques of credibility evaluation, such as the claimant's reputation for lying,
8 prior inconsistent statements . . . and other testimony by the claimant that appears
9 less than candid." *Smolen*, 80 F.3d at 1284. The record shows that Plaintiff
10 discussed vocational rehabilitation (DVR) services with her counselor multiple
11 times. Tr. 610, 616, 628. Despite this, at the hearing, Plaintiff stated it had been
12 mentioned to her several times, but did not know what it was. Tr. 51. Plaintiff's
13 counselor stated that she was unsure she used the term DVR with her in sessions
14 with Plaintiff and that Plaintiff did not retain that name. Tr. 724. Additionally, in
15 2013, Plaintiff took a vacation/trip that resulted in missing treatment. Tr. 672, 681.
16 When asked about this vacation at her hearing, Plaintiff stated that she had never
17 been on vacation. Tr. 52. She then stated that she went to Alabama to pick up her
18 daughter. *Id.* When asked how she got there, she stated she drove. *Id.* Then, she
19 stated she flew down there, but drove back. *Id.* After the hearing, Plaintiff's
20 counselor stated that she only used the work "trip" to reference that Plaintiff would
21 be missing sessions and she did not know where she was going, but acknowledged
22 that she knew Plaintiff traveled to Everett, WA, during her treatment. Tr. 724.
23 Considering the inconsistencies in Plaintiff's statements between the treatment
24 records and the hearing, this is a legally sufficient reasons for the ALJ to determine
25 that Plaintiff's symptom reports may be unreliable.

26 As such, the ALJ did not error in his determination that Plaintiff's statements
27 regarding persistence, intensity and limiting effects of her symptoms where less
28 than fully credible.

1 **B. Opinion of Richard Vaughan, M.D.**

2 Plaintiff argues the ALJ failed to properly consider and weigh the medical
3 opinion expressed by treating physician Dr. Vaughan. ECF No. 12 at 13-15.

4 In weighing medical source opinions, the ALJ should distinguish between
5 three different types of physicians: (1) treating physicians, who actually treat the
6 claimant; (2) examining physicians, who examine but do not treat the claimant;
7 and, (3) non-examining physicians who neither treat nor examine the claimant.

8 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
9 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at
10 631.

11 When a treating physician's opinion is not contradicted by another
12 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
13 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
14 physician's opinion is contradicted by another physician, the ALJ is only required
15 to provide "specific and legitimate reasons" for rejecting the opinion of the treating
16 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). The specific and
17 legitimate standard can be met by the ALJ setting out a detailed and thorough
18 summary of the facts and conflicting clinical evidence, stating his interpretation
19 thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
20 1989). The ALJ is required to do more than offer his conclusions, he "must set
21 forth his interpretations and explain why they, rather than the doctors', are
22 correct." *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir. 1988).

23 On September 30, 2011, Dr. Vaughan completed a Documentation Request
24 Medical or Disability Condition for the Washington State Department of Social
25 and Health Services (DSHS). Tr. 283-285. Dr. Vaughn stated that Plaintiff's
26 bipolar disease limited Plaintiff's ability to work by limiting her interaction with
27 others. Tr. 283. When asked if Plaintiff should be limited to a specific number of
28 hours of work per week, Dr. Vaughan stated "none." *Id.* He also opined that if

1 Plaintiff were treated and stayed on her meds she would not be limited in her
2 ability to participate in activities related to preparing for and looking for work such
3 as attending educational or vocational classes. *Id.* When asked if Plaintiff's
4 condition impacted her ability to access services, such as using the telephone,
5 receiving treatment, making and keeping appointments, using transportation
6 services, or finding locations of services, Dr. Vaughan responded with "Yes" and
7 underlined "making and keeping appointments" and stated "if off meds." Tr. 384.
8 He also stated that he expected Plaintiff's condition to limit her ability to work,
9 look for work, or train for work for six months. *Id.*

10 The ALJ gave Dr. Vaughan's opinion "little weight" because (1) there was
11 no evidence attached to the opinion, (2) the opinion appeared to be based upon
12 Plaintiff's self-reports, (3) Dr. Vaughan indicated Plaintiff's exacerbation of
13 psychological symptoms was related to a failure to take medication as prescribed,
14 and (4) the opinion is inconsistent with the overall record. Tr. 30-31.

15 The ALJ's first reason for rejecting Dr. Vaughan's opinion, that there was
16 no evidence attached to the opinion, is not legally sufficient. The Ninth Circuit has
17 held that an opinion expressed in a check-off list that lacks substantive medical
18 findings to support the conclusion may be rejected. *Batson*, 359 F.3d at 1195.
19 However, if the opinion expressed in a check-off list is based on significant
20 experience with the claimant and supported by numerous records, it is entitled to
21 weight that an otherwise unsupported and unexplained check-off list would not
22 merit. *Garrison*, 759 F.3d at 1013. Here, Dr. Vaughan had treated Plaintiff since
23 August 16, 2010, including seven appointments prior to the September 30, 2011,
24 opinion. Tr. 309-310, 313-324. Considering the experience Dr. Vaughan had in
25 treating Plaintiff's mental health impairments, the fact that these records were not
26 attached to the DSHS form containing his opinion is not a legally sufficient reason
27 to reject his opinion. However, any resulting error from this reason is harmless
28 error, as the ALJ provided other legally sufficient reasons for rejecting Dr.

1 Vaughan's opinion and gave greater weight to the opinions of state agency medical
2 advisors, which this Court finds was without error. *Tommasetti v. Astrue*, 533 F.3d
3 1035, 1038 (9th Cir. 2008) (an error is harmless when "it is clear from the record
4 that the . . . error was inconsequential to the ultimate nondisability determination").

5 The ALJ's second reason for rejecting Dr. Vaughan's opinion, that it
6 appeared to be based upon Plaintiff's self-reports, is not legally sufficient. An ALJ
7 may discount the opinions of a treating provider because they were based "to a
8 large extent" on the claimant's reports of symptoms, which the ALJ found not
9 reliable; however, the ALJ must provide a basis for his determination that the
10 treating provider's opinion was based "to a large extent" on the claimant's
11 symptom reports. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Here,
12 the ALJ failed to provide a basis for his finding that Dr. Vaughan's opinion was
13 based largely on Plaintiff's symptom reports. Tr. 30-31. Therefore, this reason is
14 legally insufficient to reject Dr. Vaughan's opinions. However, any error resulting
15 from this reason is harmless because, as discussed below, the ALJ provided a third
16 legally sufficient reason to reject Ms. Gunn's opinions. *Tommasetti*, 533 F.3d at
17 1038 (an error is harmless when "it is clear from the record that the . . . error was
18 inconsequential to the ultimate nondisability determination").

19 The ALJ's third reason for rejecting Dr. Vaughan's opinion, that he
20 indicated Plaintiff's exacerbation of psychological symptoms was related to a
21 failure to take medication as prescribed, is legally sufficient. As discussed above,
22 the treatment records from Dr. Vaughan support the conclusion that Plaintiff's
23 symptoms were exacerbated when she failed to take her medication. Additionally,
24 Dr. Vaughan's opinion itself supports the conclusion that Plaintiff's symptoms
25 increase in severity when off medication: Plaintiff would not have any limitations
26 to preparing and looking for work if treated and staying on her medications, Tr.
27 283, and that Plaintiff has difficulty in making and keeping appointments if off her
28 medications, Tr. 284. Considering the determination that Plaintiff's symptoms are

1 reduced with medication and treatment and Dr. Vaughan's opinion was only to last
2 for six months, it is reasonable to assume that these impairments would not last the
3 required twelve months. Therefore, this is a specific and legitimate reason to reject
4 the opinion. *See Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th
5 Cir. 2006) (impairments that can be controlled effectively with medication are not
6 disability for purposes of determining eligibility).

7 The ALJ's fourth reason for rejecting Dr. Vaughan's opinion, that it is
8 inconsistent with the overall record, is legally sufficient. The ALJ determined that
9 Plaintiff's ability to date, take trips, attend group therapy and participate without
10 decompensating, and provide in home health care for her aunt were all inconsistent
11 with Ms. Gunn's opinions. Tr. 31. As discussed above, these activities are
12 supported by substantial evidence. Therefore, the ALJ's determination that these
13 activities are inconsistent with Dr. Vaughan's opinions constitutes a specific and
14 legitimate reason for rejecting the opinions.

15 **C. Opinion of Sue Gunn, M.S.**

16 Plaintiff argues the ALJ failed to properly consider and weigh the opinion
17 expressed by treating counselor, Sue Gunn, M.S. ECF No. 12 at 15-18.

18 Unlike Dr. Vaughan, Ms. Gunn is not an acceptable medical source; instead,
19 she is considered an "other source." *See* 20 C.F.R. §§ 404.1513(d), 416.913(d).
20 Generally, the ALJ should give more weight to the opinion of an acceptable
21 medical source than to the opinion of an "other source," such as a therapist. 20
22 C.F.R. §§ 404.1513(d), 416.913(d). An ALJ is required, however, to consider
23 evidence from "other sources," 20 C.F.R. §§ 404.1513(d), 416.913(d); S.S.R. 06-
24 03p, "as to how an impairment affects a claimant's ability to work," *Sprague*, 812
25 F.2d at 1232. An ALJ must give reasons that are specific and germane to each
26 "other source" to discount their opinions. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th
27 Cir. 1993); *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1053-1054 (9th
28 Cir. 2006).

1 On March 22, 2012, Ms. Gunn completed a Documentation Request for
2 Medical or Disability Condition form for DSHS. Tr. 286-288. She identified
3 Plaintiff's conditions as bipolar I disorder, obsessive compulsive disorder, and
4 borderline personality disorder. Tr. 286. She limited Plaintiff to ten hours of work
5 activity and ten hours of activities related to preparing for and looking for work per
6 week due to psychological impairments. *Id.* Ms. Gunn opined that Plaintiff's
7 impairment did not affect her ability to seek treatment. Tr. 287. She stated that
8 she would expect Plaintiff's condition to limit her ability to work, look for work, or
9 train to work as discussed above for twelve months. *Id.*

10 On January 4, 2013, Ms. Gun completed a Mental Residual Functional
11 Capacity Assessment (MRFCA). Tr. 528-530. She opined that Plaintiff had a
12 severe¹ limitation in the abilities to accept instructions and respond appropriately to
13 criticism from supervisors, to get along with co-workers or peers without
14 distracting them or exhibiting behavioral extremes, and to maintain socially
15 appropriate behavior and to adhere to basic standards of neatness and cleanliness.
16 Tr. 529. She opined that Plaintiff had a marked² limitation in the abilities to
17 maintain attention and concentration for extended periods, to work in coordination
18 with or proximity to others without being distracted by them, to make simple
19 work-related decisions, to complete a normal work-day and workweek without
20 interruptions from psychologically based symptoms and to perform at a consistent
21 pace without an unreasonable number and length of rest periods, to interact
22 appropriately with the general public, and to respond appropriately to changes in
23

24 ¹A severe limitation is defined as the “[i]nability to perform one or more
25 basic work-related activities.” Tr. 528.

26 ²A marked limitation is defined as a “[v]ery significant interference with
27 basic work-related activities i.e., unable to perform the described mental activity
28 for more than 33% of the work day.” Tr. 328.

1 the work setting. Tr. 328-329. Additionally, she opined that Plaintiff had a
2 moderate³ limitation in the abilities to understand and remember detailed
3 instructions, to carry out detailed instructions, to ask simple questions or request
4 assistance, and to set realistic goals or make plans independently of others. Tr.
5 528-530.

6 On October 2, 2013, Ms. Gunn completed a second MRFCA. Tr. 531-534.
7 She opined that Plaintiff had a marked limitation in the abilities to understand and
8 remember detailed instructions, to carry out detailed instructions, to maintain
9 attention and concentration for extended periods, to perform activities within a
10 schedule, maintain regular attendance and be punctual within customary
11 tolerances, to sustain an ordinary routine without special supervision, to work in
12 coordination with or proximity to others without being distracted by them, to
13 complete a normal workday and workweek without interruptions from
14 psychologically based symptoms and to perform at a consistent pace without an
15 unreasonable number and length of rest periods, to interact appropriately with the
16 general public, to accept instructions and respond appropriately to criticism from
17 supervisors, and to get along with co-workers or peers without distracting them or
18 exhibiting behavioral extremes. Tr. 531-532. She opined that Plaintiff had a
19 moderate limitation in the abilities to maintain socially appropriate behavior and to
20 adhere to basic standards of neatness and cleanliness, to respond appropriately to
21 changes in the work setting, and to set realistic goals or make plans independently
22 of others.⁴ Tr. 532, 534. In addition to the twenty mental functional limitations

23
24 ³A moderate limitation is defined as a “[s]ignificant interference with basic
25 work-related activities, i.e., unable to perform the described mental activity for at
26 least 20% of the work day up to 33% of the work day.” Tr. 328.

27 ⁴The definitions of marked and moderate limitations are the same as the
28 January 4, 2013, MRFCA. Tr. 531.

1 address in the MRFCA, Ms. Gunn also stated that Plaintiff had marked difficulties
 2 in maintaining social functioning and in maintaining concentration, persistence or
 3 pace in reference to the 12.00 Listings “B” Criteria.⁵ Tr. 533. She opined Plaintiff
 4 would likely be off-task for 21-30% and she would likely miss four or more days
 5 per month if attempting to work a 40-hour work week. *Id.* Ms. Gunn stated that
 6 Plaintiff was being treated by a treatment team, the above opinion was the opinion
 7 of the treatment team, and there was at least one M.D. or Ph.D. on the treatment
 8 team. *Id.*

9 The ALJ gave Ms. Gunn’s opinions “little weight” because (1) the opinions
 10 were largely based on Plaintiff subjective complaints, and (2) the opinions were
 11 inconsistent with the overall record, including Ms. Gunn’s own treatment notes.
 12 Tr. 31.

13 The ALJ’s first reason for rejecting Ms. Gunn’s opinion is not legally
 14 sufficient. As discussed above, an ALJ may discount the opinions of a treating
 15 provider because they were based “to a large extent” on the claimant’s reports of
 16 symptoms, which the ALJ found not credible; however, the ALJ must provide a
 17 basis for his determination that the treating provider’s opinion was based “to a
 18 large extent” on the claimant’s symptom reports. *Ghanim*, 763 F.3d at 1162.
 19 Here, the ALJ failed to provide a basis for his finding that Ms. Gunn’s opinions
 20 were based largely on Plaintiff’s symptom reports. Tr. 31. Therefore, this reason
 21 is legally insufficient to reject Ms. Gunn’s opinions. However, any error resulting
 22 from this reason is harmless because, as discussed below, the ALJ provided a
 23 second legally sufficient reason to reject Ms. Gunn’s opinions. *Tommasetti*, 533
 24 F.3d at 1038 (an error is harmless when “it is clear from the record that the . . .
 25

26 ⁵Plaintiff argues that this opinion shows Plaintiff met a listing. ECF No. 12
 27 at 16. However, establishing the “B” Criteria alone is insufficient to meet any of
 28 the 12.00 listings. 20 C.F.R. Pt. 404, Subpt. P, App. 1.

1 error was inconsequential to the ultimate nondisability determination").

2 The ALJ's second reason for rejecting Ms. Gunn's opinion, that the opinion
 3 was inconsistent with the overall record, is legally sufficient. The ALJ determined
 4 that Plaintiff's ability to date, take trips, attend group therapy and participate
 5 without decompensating, and provide in home health care for her aunt were all
 6 inconsistent with Ms. Gunn's opinions. Tr. 31. As discussed above, these
 7 activities are supported by substantial evidence. Therefore, the ALJ's
 8 determination that these activities are inconsistent with Ms. Gunn's opinions
 9 constitutes a germane reason for rejecting the opinions.

10 **D. Opinions of state agency non-examining medical advisors**

11 Plaintiff argues the ALJ erred when he failed to account for all of the
 12 limitations opined by the state agency non-examining medical advisors in the final
 13 residual functional capacity determination. ECF No. 12 at 18-19.

14 A claimant's residual functional capacity is "the most [a claimant] can still
 15 do despite [her] limitations." 20 C.F.R. § 416.945(a); *see also* 20 C.F.R. Part 404,
 16 Subpart P, Appendix 2, § 200.00(c) (defining residual functional capacity as the
 17 "maximum degree to which the individual retains the capacity for sustained
 18 performance of the physical-mental requirements of jobs"). In formulating a
 19 residual functional capacity, the ALJ weighs medical and other source opinions
 20 and also considers the claimant's credibility and ability to perform daily activities.
 21 *See, e.g., Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226 (9th Cir. 2009).

22 Here, two state agency non-examining medical advisors, Cynthia
 23 Collingwood, Ph.D., in August 2012 and Kent Reade, Ph.D., in October 2012,
 24 reviewed the evidence available at the time of their reviews and completed
 25 MRFCA forms as part of the Disability Determination Explanations; they opined
 26 that Plaintiff was moderately limited in the abilities to maintain attention and
 27 concentration for extended periods, to accept instructions and respond
 28 appropriately to criticism from supervisors, and to get along with coworkers or

1 peers without distracting them or exhibiting behavioral extremes. Tr. 89, 115-116.
 2 Each medical advisor provided a narrative form of these limitations, stating that
 3 claimant was capable of simple repetitive tasks and appeared capable of complex
 4 tasks as well; however, due to her psychological symptoms, her ability to sustain
 5 concentration for extended periods may be compromised at times. Tr. 89, 115.
 6 Additionally, the medical advisors opined in narrative form that claimant would
 7 work best when limited to superficial interactions with the general public and co-
 8 workers and she would benefit from an understanding and consistent supervisor.
 9 Tr. 89, 116.

10 The ALJ gave “greater weight” to these opinions, but stated that “for the
 11 reasons discussed above, the claimant is better accommodated with the above
 12 residual functional capacity.” Tr. 32. The residual functional capacity
 13 determination by the ALJ only includes the psychological limitations of occasional
 14 and superficial interaction with the public and with co-workers and not performing
 15 well as a member of a highly interactive or interdependent work group. Tr. 25-26.
 16 Plaintiff argues that the ALJ erred by not including the moderate limitation in
 17 maintaining concentration, persistence or pace and the finding that she would
 18 benefit from an understanding and consistent supervisor in the residual functional
 19 capacity determination. ECF No. 12 at 18.

20 First, the term moderate is undefined on the forms completed by the medical
 21 advisors. Tr. 89, 115-116. Furthermore, the Program Operations Manual System⁶
 22

23 ⁶The POMS does not impose judicially enforceable duties on the Court or
 24 the ALJ, but it may be “entitled to respect” under *Skidmore v. Swift & Co.*, 323
 25 U.S. 134 (1944), to the extent it provides a persuasive interpretation of an
 26 ambiguous regulation. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88, 120
 27 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *Lockwood v. Comm’r Soc. Sec. Admin.*, 616
 28 F.3d 1068, 1073 (9th Cir. 2010). Here, the issue is not determining the meaning of

1 (POMS) DI 24510.060 details Social Security's Operating Policy as to the
2 MRFCA forms complete by psychological consultant. *See* POMS DI 24501.002
3 (equating the MRFCA form on the Disability Determination Explanations to SSA-
4 4734-F4-SUP addressed by POMS DI 24510.060). According to POMS DI
5 24510.060, the section of the form that includes mental function items with
6 limitations ranging from "not significantly limited" to "markedly limited," "is
7 merely a worksheet to aid in deciding the presence and degree of functional
8 limitations and the adequacy of documentation and does not constitute the [residual
9 functional capacity] assessment." POMS DI 24510.060. Instead, the actual mental
10 residual functional capacity assessment is recorded in narrative form, explaining
11 the conclusions indicated in prior section, in terms of the extent to which these
12 mental capacities or functions could or could not be performed in work settings.
13 *Id.* Therefore, the opined MRFCA was not the moderate limitation in the ability to
14 maintain attention and concentration for extended periods, but the narrative
15 section. Tr. 89, 116. As such, the ALJ was not required to include the undefined
16 moderate limitation in his residual functional capacity determination.

17 Plaintiff alleges that the opinion she would benefit from an understanding
18 and consistent supervisor is equivalent to the need for special supervision, which is
19 not included in the residual functional capacity assessment. ECF No. 12 at 18-19.
20 However, a need for an understanding and consistent supervisor could reflect a
21 need for special supervision, difficulty in the ability to adjust to changes in the
22

23 an ambiguous regulation, but instead understanding how to correctly read a form
24 produced and distributed by the Social Security Administration to its Medical
25 Consultants. Therefore, by relying on the POMS provision in this case, the Court
26 is not allowing the provision to set a judicially enforceable duty on the ALJ, but
27 only using it as a guide to define the parameters of a Medical Consultant's opinion
28 on an agency supplied form.

1 workplace, difficulty sustaining concentration, or difficulty interacting with the
 2 public, coworkers, and supervisors. Dr. Collingwood and Dr. Kent stated that
 3 Plaintiff was not significantly limited in her ability to sustain an ordinary routine
 4 without special supervision. Tr. 89, 115. Therefore, the evidence does not support
 5 Plaintiff's assertion. Both doctors did note limitations in the abilities to maintain
 6 attention and concentration and interact with the general public, coworkers, and
 7 supervisors. Tr., 89, 115-116. Therefore, the evidence supports the ALJ's
 8 conclusion reflected in the residual functional capacity assessment that Plaintiff
 9 had difficulty working with the general public, coworkers, and as part of a highly
 10 interactive or interdependent work group. Tr. 25-26; *See Andrews*, 53 F.3d at 1039
 11 (the ALJ is responsible for resolving ambiguities); *see also Tackett*, 180 F.3d at
 12 1097 (if the evidence is susceptible to more than one rational interpretation, the
 13 court may not substitute its judgment for that of the ALJ). Therefore, the ALJ did
 14 not error in his residual functional capacity determination.

15 CONCLUSION

16 Having reviewed the record and the ALJ's findings, the Court finds the
 17 ALJ's decision is supported by substantial evidence and free of harmful legal error.
 18 Accordingly, **IT IS ORDERED:**

19 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is

20 GRANTED.

21 2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

22 The District Court Executive is directed to file this Order and provide a copy
 23 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
 24 and the file shall be **CLOSED**.

25 DATED September 14, 2016.



A handwritten signature in black ink, appearing to read "M" followed by a stylized "J".

26
 27 JOHN T. RODGERS
 28 UNITED STATES MAGISTRATE JUDGE